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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,

Petitioner,

versus

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.

Respondents.

BRIEF OF RESPONDENT E. C. ERNST, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 12, 1978

INDEX

	Page
Table of Cases	1
Statutes	1
Other Authorities	2
Question Presented	3
Statement of the Case	4
Argument	5
Conclusion	12
Certificate of Proof of Service	13

TABLE OF CASES

Page

Burgess Const. Co. v. M. Morrin & Son Co., Inc., 526 F. 2d 108 (10th Cir. 1975) 5

Burton-Dixie Corp. v. Timothy McCarthy Const. Co., 436 F. 2d 405 (5th Cir. 1971) 6

General Guaranty Insurance Company v. New Orleans General Agency, Inc., 427 F. 2d 924, 928 (5th Cir. 1970) 6,10

Germany v. River Terminal Railway Co., 477 F. 2d 546 (6th Cir. 1973) 6,11

Layne & Bowler Corp. v. Western Wellworks, 261 U.S. 387 (1922) 5

Magnum Co. v. Coty, 262 U.S. 159 (1923) 11

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 6

Radiator Specialty Co. v. Cannon Mills, Et Al, 97 F. 2d 318, 117 ALR 299 (4th Cir., 1938) 8

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 5

Stokes v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 523 F. 2d 6

Weber v. McKee, 215 F. 2d 447 (5th Cir. 1954) 5

STATUTES

United States Arbitration Act, 9 U.S.C. § 1 et seq. (1947) 6,11

OTHER AUTHORITIES

Annot., Waiver of Arbitration Provision in Contract, 117 ALR 301 (1938) 10

Annot., Waiver of Arbitration Provision in Contract, 161 ALR 1426 (1946) 9

5 Am. Jur. 2d, Arbitration and Award, § 53 (1962) 10, 11

6 C.J.S. Arbitration § 36 (1975) 7

6 C.J.S. Arbitration § 37 (1975) 7

6 C.J.S. Arbitration § 39 (1975) 8

Stern & Gressman, Supreme Court Practice, § 4.3 (4th ed. 1969) 6, 11

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Respondent, E.C. ERNST, INC. ("Ernst"), respectfully submits this Brief in opposition to the Petition for a writ of certiorari filed by Providence Hospital ("Providence").

QUESTION PRESENTED

Should a writ of certiorari issue to review a decision of the Court of Appeals where the questions sought to be reviewed are not important or substantial, are questions of fact, and neither conflict with decisions of other courts of appeal nor depart from the accepted and usual course of judicial proceedings?

STATEMENT OF THE CASE

Providence's "Statement of the Case" omits or distorts a variety of significant facts which relate to its Petition*:

1. Providence suggests (Petition, p. 6-9) that it timely asserted its right to arbitration, and intended to proceed to arbitration. The suggestion is unsupported by any fact and has been, indeed, explicitly rejected.

The uncontradicted fact is that Providence never intended that any dispute go to arbitration here. In the more than seven years that this case has been pending, Providence never demanded arbitration nor took any step to initiate arbitration.

It was Providence's idea that if it could invoke the talisman of "arbitration", defensively, as ground to have the lawsuit dismissed, Providence would *then* be free to say that there was no case for arbitration – because it had allegedly been waived by the other parties involved in the lawsuit. So far as Providence was and is concerned, it did not want to go, and was not, and is not going to any arbitration. In short, "arbitration" to Providence was a bald device – a device which the District Court and Court of Appeals saw through as nothing more than an attempt to immunize Providence *from any determination* of the disputes which existed among the parties to this action. Indeed, counsel for Providence had boldly proclaimed prior to the filing of this action (while the construction was still under way) that if Ernst or any other party attempted to go to arbitration to resolve disputes which were pending, and which became central issues in this suit, Providence would immediately institute an action in the District Court to enjoin any such arbitration, (Tr. 2850-3, Ernst Trial Exhibit 268).

2. Providence refers to a Brief filed on December 17, 1970 as if that is some support for the proposition that Providence invoked arbitration as a ground of motion for stay at that time.

* To the extent that the Providence Petition incorrectly summarizes additional facts (e.g., Ernst's Complaint and related proceedings) such "facts" are not material to the Petition and will not be responded to herein.

The motion itself advanced no such ground, and the mere attachment thereto of the voluminous General Conditions does not support any such assertion. The fact is, and was, that Providence's motion and supporting Brief did not seek a stay on the grounds of arbitration. Indeed, the basis of the motion was explicitly inconsistent with arbitration. The motion was for stay "***because this cause will not be ready for *judicial* determination until such time as Manhattan has performed its obligations under the construction contract with Providence." (Emphasis supplied)

ARGUMENT

This Court would be hard pressed to find a more unlikely candidate for certiorari. The "questions" presented by Providence simply do not merit issuance of the writ.

The standards for granting a writ of certiorari are reasonably defined in Supreme Court Rule 19. The questions presented by Providence satisfy none of those standards.

To be sure, Providence tries to squeeze its "questions" into recognized categories by inventing conflicts between the Circuits and "important" questions of law. But the categories simply do not fit the issues.*

The only "reason" advanced by Providence in support of its Petition which concerns Ernst** is the supported "hostility" of

* At root, Providence is unable to show that the issues raised by it are important to the public, and not just to the parties involved. That failure virtually precludes the granting of certiorari. See, e.g., Rice v. Sioux City Cemetery, 349 U.S. 70 (1955); Layne & Bowler Corp. v. Western Wellworks, 261 U.S. 387 (1922).

** To be sure, Providence's other "reason" – the alleged improper standard utilized by the Fifth Circuit in reviewing the District Court's construction of a purported "no-damage" clause – is likewise without merit. Providence rests its argument on an "implied" finding made by the District Court (Petition, p. 14). Despite that *ipse dixit*, the District Court did *not* make any such "implicit" finding, i.e., a finding which is necessarily encompassed within an express finding. Weber v. McKee, 215 F. 2d 447 (5th Cir. 1954). *A fortiori*, the Court of Appeals decision was not in conflict with Burgess Const. Co. v. M. Morrin & Son Co., Inc., 526 F. 2d 108 (10th Cir. 1975).

the Fifth Circuit * to arbitration and the supposed "conflict" between the Court of Appeals decision and the decision of the Sixth Circuit in *Germany v. River Terminal Railway Co.*, 477 F. 2d 546 (6th Cir. 1973). The argument is preposterous. The fact is, as the Court of Appeals found, that *despite* the federal policy favoring arbitration** *Providence waived arbitration.* 551 F. 2d at 1040, 1041. That determination of what is, at base, a question of fact, *(Burton-Dixie Corp. v. Timothy McCarthy Const. Co.*, 436 F. 2d 405 [5th Cir. 1971]) is not a proper subject for this Court's discretionary review.

> "The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon a construction of particular contracts or written instruments." Stern & Gressman, *Supreme Court Practice*, § 4.3 (4th Ed. 1969).

The Court of Appeals properly rested its finding of waiver on Providence's pre- and post-litigation conduct. And that finding was more than amply supported by the facts and the law.

The law is clear that a party desiring to invoke arbitration as a means of resolving a dispute (instead of permanently avoiding determination of that dispute) must take affirmative action – or the right to arbitrate will be no longer available:

> "... the offensive in instituting proceedings for arbitration *lies with the aggrieved party:* and *the other's denial of any contractual obligation to arbitrate does not relieve the aggrieved party from the necessity of taking steps to initiate an arbitration before seeking an order under the arbitration act ...* " 6 C.J.S. Arbitration § 36, p. 223 (Emphasis supplied).

and

> "The right to enforce arbitration may be waived by failure to assert, or delay in asserting the right." 6 C.J.S. Arbitration § 37, p. 227.

Those general principles – and the action required to preserve the right to arbitration – are confirmed by Sections 3 and 4 of the Federal Arbitration Act (9 USCA § 3) which provides in part:

> "3. Stay of proceedings where issue therein referable to arbitration.
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action *until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.*" (Emphasis supplied)
>
> "4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration *may petition* any United States district court which, save for such agree-

* Presumably, this "hostility" is limited – according to Providence – to this case, for Providence cites another Fifth Circuit case, General Guar. Ins. Co. v. New Orleans General Agency, Inc., 427 F. 2d 924 (5th Cir. 1970), which the Court of Appeals *specifically distinguished* in the instant case. 551 F. 2d at 1040, n. 39.

** Providence's citation of Alabama state law is entirely inapposite. The Court of Appeals correctly applied federal law, i.e., the United States Arbitration Act, 9 U.S.C. § § 1, *et seq.*, 551 F. 2d at 1040 citing Prima Paint Corp. v. Flood & Conklin Mfg. Co. 388 U.S. 395 (1967) and Stokes v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 523 F. 2d 433 (6th Cir. 1975).

ment, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, *for an order directing that such arbitration proceed in the manner provided for in such agreement.*" (Emphasis supplied)

The requirement to take affirmative action is clear. The remedies available are codified – a *stay of proceedings* for a pending court action and a *petition to compel arbitration.* Providence did neither.

> "It is the policy of the court to enforce arbitration agreements without legal technicality, *but it is generally incumbent on one who wishes to arbitrate to follow the procedure provided for by the agreement to arbitrate or by controlling mandatory statute.*" C.J.S. Arbitration §39, p. 231. (Emphasis supplied)

A party which desires to interpose arbitration as a judicial plea in bar is obliged to do so either by motion addressed to the Complaint or in its Answer. A failure to raise that bar in either of those two ways constitutes a waiver. It is clear that Providence never raised arbitration in support of its motion to dismiss Ernst's original complaint nor in any responsive pleading which it filed thereto.

The first time Providence raised the cry of arbitration was in the Fall of 1972, some two years after the case had begun – and then only after (a) a five-day trial in early 1971 of the issue of the compliance of the Fairbanks generator with the specifications, (b) numerous amendments in pleadings, and (c) partial discovery. That course of conduct by itself would preclude Providence from seeking arbitration even if it had sought arbitration at that time.

There is more. One who seeks to invoke arbitration as a bar to Court action cannot do so if he has voluntarily submitted to the Court *his own claims* against the other parties.* *This is*

* Radiator Specialty Co. v. Cannon Mills, Et Al, 97 F. 2d 318, 117 ALR 299 (4th Cir., 1938).

precisely what Providence did by asserting a counterclaim * against Ernst for damages in January, 1972. That counterclaim was dismissed. It was only after that dismissal that Providence decided to resort to its arbitration gambit. It was far too late. Having judicially asserted such a claim, Providence was thereafter barred from invoking arbitration.

Another fact bars Providence. Even though Ernst's original complaint was dismissed as against Providence at the trial (in 1971) on the issue of compliance of the proposed Fairbanks-Morse emergency generator equipment, Providence participated in the trial in every respect in which an interested party defendent would. Its participation contributed to the ultimate result of the Court's holding that the emergency generator equipment proposed by Fairbanks-Morse did not qualify under the specifications. The result, of course, was very much to Providence's liking. Having gotten such a judicial determination, Providence thereafter concluded that it had enough of litigation. As a matter of law, Providence's participation in the hearing aforesaid barred it from thereafter invoking arbitration in respect of disputes among the same parties on the same Project, and under the same contract.

> ". . . the defendent's conduct in filing an answer or counterclaim, or tendering issue on the merits, *without demanding arbitration* is an action instituted on the contract by the other party in disregard of the arbitration provision, is clearly inconsistent with the notion that he considers the arbitration provision as still in effect, or anticipates availing himself of his rights thereunder, and consequently, generally constitutes a waiver thereof." 161 ALR 1429 [citing cases] [Emphasis supplied]

* Interestingly, this counterclaim was asserted against Ernst at a time when the District Court had already dismissed Ernst's original complaint as against Providence in December 1970.

It is disingenous for Providence to suggest that its arbitration argument turns on whether it needed to make a demand for arbitration before it moved to dismiss the suit.* That never was, and still is not, the issue. Since Providence *never* invoked arbitration, and never intended to, the distinction between pre and post suit demand, is an irrelevant gratuity.

> ". . . where defendent neither demands arbitration, nor takes steps to secure arbitrators, the provisions in the contract for arbitration constitute no defense to the action." Anno., Waiver of Arbitration Clause, 117 ALR 308 at 313.

> "An arbitration agreement in a contract is not a defense to an action on the contract, but it may be set up by the defendent in such action for the purpose of indicating that he has not waived his right to arbitration; and the remedy of a defendant which is sued in New York on a contract containing an arbitration provision is to proceed under §§ 3 and 5 of the Arbitration Law of New York, by motion to direct that the arbitration proceed and that the action be stayed." [citing cases] 117 ALR 308 at 315

Good faith and diligence are prerequisites of the right to insist on arbitration.

> "Parties to an arbitration agreement are under a duty to act in good faith. Each owes to the other a duty to make a fair effort to carry out its provisions and to accomplish the real object of the agreement. If the arbitration fails through default of one of the parties, or the fault of his arbitrator, that party has abrogated the contract, and the other party, provided he is free from fault in the matter, may elect not to comply with the arbitration provision, and may bring suit on the contract without an award being made. A refusal of one party to arbitrate in accordance with the terms of the contract, his neglect or failure within a reasonable time to perform the agreement, or to demand arbitration if under a duty to do so, will each be relinquishment of his right to insist upon arbitration, either to enable him to bring suit himself or as a bar to a suit by the opposite party." [5 Am. Jur. 2d Arbitration and Award, § 53, p. 559]

Those prerequisites were undone by Providence's conduct.

Germany v. River Terminal Railway Co., supra (Petition, p. 13) presents no conflict between the Circuits. All that *Germany* holds is that "waiver may not be inferred from the fact that a party does not rely *exclusively* on the arbitration provisions of a contract.*" 447 F. 2d at § 47. (Emphasis supplied) Here, as the Court of Appeals found, Providence did not rely on the arbitration *at all* until it was too late; in *Germany*, in contrast, the arbitration provisions of the contract "were specifically cited"**: *Id.* In any event, the Court of Appeals here did *not* rely solely on Providence's participation in the litigation***. To the contrary, the Court held that in view of Providence's "pattern of pre- and post-suit behavior" it waived arbitration. 551 F. 2d at 1041. The decision was and is correct, and is not in conflict with *Germany*.

In summary, this case is not a proper case for the issuance of a writ of certiorari. It has long been settled that certiorari is *not* a vehicle whereby the defeated party in the Court of Appeals is simply given another hearing. *Magnum Co. v. Coty*, 262 U.S. 159 (1923). Yet Providence's Petition is unable to demonstrate anything more.

* It is apparent that the authority relied on by Providence in its Petition is of no effect here. General Guaranty Insurance Company v. New Orleans General Agency, Inc., 427 F. 2d 924, 928 (5th Cir. 1970) holds only that a pre-suit demand for arbitration is not a prerequisite for invoking the Federal Arbitration Act. It says nothing of the duty of the aggrieved party *after* suit has been filed. It is clear from the Act that the two remedies offered are designed to enforce a party's right to arbitration – not to thwart a resolution of the matter by merely mentioning the existence of an arbitration clause.

* The law is clear that the claimed "conflict" must be substantial; "there must be a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern & Gressman, *supra*, § 4.3

** And not, as here, buried within the 20-page "general conditions" 551 F. 2d at 1040.

*** Indeed, here the participation was far more extensive than the "meet[ing] [of] all issues raised" which occurred in *Germany* (477 F. 2d at 547). Here, Providence "engaged in discovery, presented cross-claims*** and filed various motions." 551 F. 2d at 1040.

CONCLUSION

For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Glower Whitehead Jones, Attorney for E.C. Ernst, Inc., respondent herein, hereby certify that I have served copies of the foregoing Brief in opposition to the Petition for a Writ of Certiorari on the several parties hereto by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record as follows on this 12th day of January, 1978:

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